STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 25, 2002
v	No. 224161 Wayne Circuit Court
MUSTAFA MUJANOVIC, Defendant-Appellant.	LC No. 99-006118

Before: Zahra, P.J., and Smolenski and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction of assault with intent to commit second-degree criminal sexual conduct. MCL 750.520(g)(2). Defendant's conviction arose from an alleged sexual assault against a fifteen-year-old victim who lived in the same household as defendant. After a bench trial, the trial court convicted defendant of the above charge and sentenced him to a term of three years' probation. We affirm.

I. Waiver of the Right to a Jury Trial

Defendant first contends that he is entitled to a new trial because his waiver of a trial by jury was neither knowing nor voluntary. Defendant argues that the trial court failed to specifically question him regarding his knowledge and understanding of his constitutional right to a jury trial. Defendant also argues that he did not understand the difference between a bench trial and a jury trial, and did not understand that he possessed a constitutional right to a jury trial. A valid waiver of the constitutional right to a trial by jury must be voluntary. *People v Godbold*, 230 Mich App 508, 512; 585 NW2d 13 (1998). The trial court's determination that a defendant validly waived his right to a jury trial is reviewed for clear error. *People v Leonard*, 224 Mich App 569, 595; 569 NW2d 663 (1997).

MCR 6.402(B) provides the process by which a trial court may accept a defendant's waiver of his right to a jury trial:

> Before accepting a waiver, the court must advise the defendant in open court of the constitutional right to trial by jury. The court must also ascertain, by addressing the defendant personally, that the defendant understands the right and that the defendant voluntarily chooses to give up that right and to be tried by the court. A verbatim record must be made of the waiver proceeding.

In the instant case, the trial court did question defendant, through an interpreter, regarding his waiver of the right to a jury trial. Defendant indicated that he wished to do so, that he had discussed the issue with his lawyer, and that no one had threatened him or promised him anything in order to influence his decision.[1] Although the trial court did not explicitly advise defendant regarding the *meaning* of his constitutional right to a jury trial, it was not required to do so. *Leonard, supra* at 595-596. Based on our review of the record, we conclude that the trial court sufficiently questioned defendant, and that defendant's waiver was voluntary and knowing.

II. Prior Bad Acts Evidence

Defendant next contends that the trial court erroneously admitted evidence of prior bad acts, in violation of MRE 404(b). The decision to admit prior bad acts evidence is within the trial court's discretion, and will only be reversed where a clear abuse of that discretion has occurred. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). Furthermore, because defendant failed to object to the introduction of this evidence at trial, we review this allegation of unpreserved, nonconstitutional error for plain error affecting the defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

MRE 404(b)(1) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

Pursuant to MRE 404(b), evidence of other crimes, wrongs or acts is admissible if: (1) the evidence is offered for a proper purpose, rather than to prove the defendant's character or propensity to commit a crime, (2) the evidence is relevant to an issue or fact of consequence at trial, and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice. *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994); *People v Hawkins*, 245 Mich App 439, 447-448; 628 NW2d 105 (2001). MRE 404(b) is a rule of inclusion and courts should adopt a flexible approach when ruling on the admissibility of prior bad acts evidence. *People v Sabin (After Remand)*, 463 Mich 43, 56-59; 614 NW2d 888 (2000); *Hawkins, supra* at 448.

The victim testified at trial that defendant sexually assaulted her on March 4, 1999, in their home, while her mother was away at work. That incident formed the basis for the instant charges. In addition, the victim testified that defendant had sexually assaulted her on three or four previous occasions. She testified that defendant always committed these acts while her mother was away at work, and that he would pretend to treat her well whenever her mother was

[1] Furthermore, we note defense counsel's testimony at the *Ginther* hearing that he explained the difference between a bench trial and a jury trial to defendant, and that defendant indicated understanding of the concept.

home. We conclude that the evidence tended to prove a common plan, scheme, or system on the part of the defendant, a proper purpose for admission of the evidence under MRE 404(b).

Furthermore, we conclude that the evidence was relevant because it tended to support the victim's credibility. We note that evidence of other sexual acts between a defendant and his victim may be admissible when the defendant and the victim live in the same household, and (1) the victim's testimony would seem incredible without the testimony regarding the defendant's prior acts, or (2) the evidence is required to rebut the defendant's claim that the charges were groundless. *People v DerMartzex*, 390 Mich 410, 414-415; 213 NW2d 97 (1973); *People v Layher*, 238 Mich App 573, 585; 607 NW2d 91 (1999). In the instant case, the victim and defendant lived in the same household. The victim alleged that defendant had sexually assaulted her, and defendant contended that the victim had fabricated the charges. Therefore, this case presented a classic credibility contest, and the victim's testimony regarding defendant's prior sexual acts was relevant to her credibility, and therefore properly admissible. *DerMartzex*, *supra*.

Finally, we conclude that the probative value of the evidence was not substantially outweighed by the danger for unfair prejudice. Given that defendant was tried before a judge, rather than a jury, there was little danger that the challenged testimony unfairly prejudiced the trier of fact. In a bench trial, "the judge is less likely to be deflected from the task of fact-finding by prejudicial considerations that a jury might find compelling." *People v Edwards*, 171 Mich App 613, 619; 431 NW2d 83 (1988).

III. Ineffective Assistance of Counsel

Defendant next contends that he was denied the effective assistance of counsel, for multiple reasons. In order to establish ineffective assistance of counsel, a defendant must show that his counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and that the representation so prejudiced him that he is entitled to a new trial. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000).

> As for deficient performance, a defendant must overcome the strong presumption that his counsel's actions constituted sound trial strategy under the circumstances. As for prejudice, a defendant must demonstrate a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. [*Id*. at 302-303 (internal citations and quotations omitted).]

Defendant first argues that his attorney was ineffective because he did not adequately prepare for trial. "When making a claim of defense counsel's unpreparedness, a defendant is required to show prejudice resulting from this alleged lack of preparation." *People v Caballero*, 184 Mich App 636, 640; 459 NW2d 80 (1990).

Defense counsel spent approximately 1 ½ to 2 hours with defendant in advance of trial. During their meeting, and with the assistance of an interpreter, defendant told his attorney that he did not assault the victim. Defendant also told his attorney that the victim had manufactured the sexual assault claim out of jealously that defendant's children were coming to live with them in the United States. At trial, defense counsel asked questions regarding this subject and defendant testified that the victim had manufactured her assault claim because of jealousy. However,

defendant also admitted physically assaulting the victim, stating that he did so because the victim had repeatedly requested money to buy drugs.

Based on our review of the record, we conclude that defendant has failed to show prejudice because of his attorney's alleged unpreparedness. Defense counsel elicited testimony concerning the facts that defendant told him about prior to trial, and he argued the defenses that defendant raised. Defendant has failed to explain how the outcome of the trial would have been different if defense counsel would have spent additional time with him in advance of trial. Because defendant has failed to demonstrate the requisite prejudice, we conclude that he was not denied the effective assistance of counsel on this ground.

Defendant next argues that his attorney was ineffective because he failed to object to a leading question asked by the prosecutor. During trial, the victim testified that defendant laid on top of her and put one hand over her nose and mouth. She then testified that defendant's other hand was "on top of my body," and that defendant was moving this hand "on the back and down," outside of her clothes. The prosecutor then asked the victim, "[D]id he put his hands on your breasts?" The victim answered in the affirmative and then testified that defendant also moved his hands down to her vagina. Defendant argues that the prosecutor's question was impermissibly leading, and that his trial counsel was ineffective in failing to object on that ground. We disagree. Even if the prosecutor's question were leading, and even if defense counsel had objected on those grounds, the prosecutor could have easily rephrased the question and elicited the same testimony. We conclude that defendant was not denied the effective assistance of counsel on this ground.

Defendant next argues that defense counsel was ineffective for failing to properly cross-examine the victim. Defendant argues that defense counsel should have asked the victim about discrepancies between her trial testimony and her statement to police, and should have asked her whether defendant actually assaulted her because she repeatedly asked for money to buy drugs. First, we note defendant's failure to elicit any evidence at the *Ginther* hearing that the victim's trial testimony was actually different from her police statement. Second, defendant failed to show that the victim's testimony would have changed if defense counsel had accused her of asking for drug money. We do not agree that trial counsel's performance fell below prevailing professional norms when he failed to question the victim along the lines that defendant now advocates. "Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy." *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Defendant has failed to overcome the presumption that defense counsel's decision was a matter of sound trial strategy.

Defendant next argues that defense counsel was ineffective for failing to clarify the testimony of a prosecution witness, Sead Kesinovic, regarding defendant's alleged admission that he assaulted the victim. Kesinovic testified that he confronted defendant with the accusation that he had assaulted the victim, and defendant admitted attacking her. Kesinovic told defendant that the victim was just a child, and that defendant had violated the law. Defendant responded that, "if [he] didn't know the American law, [he] would not have done that." Defendant also stated, "I could have done that before, if she's willing. If she's not, then a fist of a hand in her head. I put her unconscious, and then I'll do whatever I want."

Defendant complains that Kesinovic's testimony was vague and that it could have been construed to mean that defendant assaulted the victim, but did not *sexually* assault her. Defendant contends that his trial counsel rendered ineffective assistance when he failed to cross-examine Kesinovic with regard to this distinction. We conclude that defense counsel was not ineffective in this regard because defendant has not overcome the presumption that his counsel's decision was sound trial strategy. Furthermore, the trier of fact could have accepted defendant's argument and interpreted Kesinovic's testimony as an indication that defendant admitted a simple assault in response to the victim's requests for drug money. However, the trial judge could also have interpreted the testimony as an admission of a sexual assault. The trial court concluded that the victim was credible and that the defendant was not. Defendant has simply not shown that the outcome of the trial would have been different if defense counsel would have cross-examined Kesinovic along the lines now argued.

Defendant next argues that defense counsel was ineffective for failing to object to the victim's testimony regarding defendant's prior bad acts. As set forth above, the challenged evidence was properly admissible under MRE 404(b). Trial counsel is not required to make meritless motions or objections. *People v Knapp*, 244 Mich App 361, 386; 624 NW2d 227 (2001). Therefore, defendant is not entitled to relief on this ground.

Finally, defendant argues that defense counsel was ineffective for failing to secure the appearance of a potential defense witness. Defense counsel served the witness with a subpoena, but she failed to appear for trial. Apparently, when the witness failed to appear on the first day of trial, defense counsel obtained a continuance. When the witness failed to appear on the second day of trial, defense counsel stated that the witness "was afraid of being here today." Defense counsel rested his case without taking further measures to procure the witness' appearance. Defendant claimed that this failure constituted ineffective assistance. However, defendant failed to elicit any testimony at the *Ginther* hearing regarding the identity of the missing witness or the alleged substance of her testimony. Because there is no evidence in the record indicating that the witness' testimony would have affected the outcome of the case, defendant is not entitled to relief on this ground.

IV. Exclusion of Hearsay Evidence

Defendant next contends that the trial court erroneously excluded testimony offered by his sister, Zineta Aldobasic. First, defendant argues that the trial court erroneously excluded Aldobasic's testimony regarding the conversation between defendant and Kesinovic, which she witnessed. Second, defendant argues that the trial court erroneously excluded Aldobasic's testimony regarding the victim's spending habits. "The decision whether evidence is admissible is within the trial court's discretion and should only be reversed where there is a clear abuse of discretion." *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998), citing *People v Bahoda*, 448 Mich 261; 531 NW2d 659 (1995). We cannot say that the trial court abused its discretion in excluding the witness' proffered testimony.

When Aldobasic attempted to testify at trial, the court sustained the prosecutor's objection, ruling that the proffered testimony was hearsay and was comprised of self-serving statements made by defendant. Although defendant never made an offer of proof regarding what the witness intended to say, we can draw some indication from the questions asked. Defense counsel attempted to ask Aldobasic, "Did you hear [defendant], during this conversation,

mention anything about putting—". Defense counsel also attempted to ask the witness, "Did [defendant] tell—." From the questions asked, it is obvious that defense counsel was attempting to elicit testimony regarding defendant's own out-of-court statements, made in Aldobasic's presence.

Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). However, a party's own statement is not hearsay if it is offered against that party. MRE 801(d)(2). In the instant case, Aldobasic attempted to testify concerning what defendant stated to Kesinovic, but the statement was self-serving and was not offered against defendant. Therefore, the trial court correctly found that Aldobasic's testimony did not qualify as a party admission under MRE 801(d)(2).

Defendant argues that the testimony was not hearsay because it was not offered to prove the truth of the matter asserted. Rather, defendant argues that the testimony was offered to impeach Kesinovic's testimony regarding defendant's alleged admission to attacking the victim. "The purpose of extrinsic impeachment evidence is to prove that a witness made a prior inconsistent statement—not to prove the contents of the statement. *People v Jenkins*, 450 Mich 249, 256; 537 NW2d 828 (1995). However, the witness was not prepared to testify that *Kesinovic* had made a prior inconsistent statement. Rather, she was prepared to testify that *defendant* had made a prior consistent statement—consistent, that is, with defendant's theory of the case. We conclude that the proffered testimony was hearsay, not within any exception. The trial court did not err in excluding the testimony on that basis.

Although defendant also argues that the trial court erroneously excluded Aldobasic's testimony regarding the victim's spending habits, we find no merit in this argument. Aldobasic attempted to testify that the victim spent $500 per day on fortune tellers. The trial court excluded this testimony, ruling that it was irrelevant. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. We agree with the trial court that the proffered evidence was irrelevant. Defendant did not advance a trial theory that he had assaulted the victim because she was spending too much money on fortune tellers. Instead, defendant argued that the victim had fabricated the charges because she was jealous of his children, and argued that he assaulted her because she was asking for drug money. The trial court did not abuse its discretion in excluding Aldobasic's testimony on the basis of relevance.

V. Interpreter's Interference with Defendant's Right to a Fair Trial

Defendant next contends that he was deprived of a fair trial and deprived of the effective assistance of counsel because his interpreter failed to inform defense counsel or the trial court of his requests. Defendant argues that, on the first day of trial, he told the interpreter that he wanted to speak to his attorney and that he wanted a different attorney. However, defendant claims that the interpreter failed to relay these requests, and simply responded that it was too late for either of his requests to be granted.

We note that defendant did not call the interpreter as a witness at the *Ginther* hearing. Furthermore, defense counsel testified that defendant never indicated to him that he wanted a different attorney. Therefore, defendant proceeds on the unsupported allegation that he wanted a

new attorney, and that he informed the interpreter of his requests on the first morning of trial. However, even if defendant's claim were true and the interpreter did fail to convey the above requests, we would conclude that this failure did not deny defendant the effective assistance of counsel.

Although an indigent defendant has a right to counsel, he is not entitled to counsel of his own choosing. *People v Ginther*, 390 Mich 436, 441; 212 NW2d 922 (1973); *People v Ceteways*, 156 Mich App 108, 118; 401 NW2d 327 (1986). "Appointment of a substitute counsel is warranted only upon a showing of good cause and where substitution will not unreasonably disrupt the judicial process." *People v Mack*, 190 Mich App 7, 14; 475 NW2d 830 (1991). The decision regarding substitution of trial counsel is within the sound discretion of the trial court, and will not be upset on appeal absent an abuse of discretion. *Id*. Because defendant has not demonstrated that he had good cause for substitution of defense counsel on the first day of trial, he is not entitled to relief on this issue.

VI. Motion for a New Trial

Finally, defendant contends that the trial court erroneously denied his motion for a new trial because his conviction was against the great weight of the evidence. The trial court's denial of a motion for a new trial based on the great weight of the evidence is reviewed for an abuse of discretion. *People v McCray*, 245 Mich App 631, 637; 630 NW2d 633 (2001). Defendant's entire argument is premised on the contention that the testimony of the victim and Kesinovic was too incredible to be believed. Defendant's argument is without merit. The trial court was presented with conflicting testimony regarding what happened. The victim testified that defendant assaulted her, and Kesinovic testified that defendant admitted to some type of assault. Defendant denied that he assaulted the victim in a sexual manner, but claimed that he grabbed her when she asked for drug money. Conflicting testimony is an insufficient ground for granting a new trial based on the great weight of the evidence. *People v Lemmon*, 456 Mich 625, 643; 576 NW2d 129 (1998). "Particularly where the issue involves the credibility of the witness whose testimony is in conflict, the trial court's resolution of a factual issue is entitled to deference." *People v Parker*, 230 Mich App 337, 341; 584 NW2d 336 (1998). The trial court specifically stated that it found the victim's testimony to be credible, and found defendant's testimony incredible. We will not disturb the findings of the trial court, which had the opportunity to observe the witnesses first-hand.

Affirmed.

/s/ Brian K. Zahra
/s/ Michael R. Smolenski
/s/ Michael J. Talbot